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No. 06-400

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In The

Supreme Court of the United States

ELLIS C. SMITH,

Petitioner,

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY BRIEF

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I. Petitioner's Arguments Are Properly Before the Court

Contrary to the government's assertion, Resp. 6, 9, Petitioner has not waived his arguments. First, Petitioner specifically raised the doctrine requiring that interpretive doubt be resolved in favor of veterans at the Court of Appeals for Veterans Claims (the "Veterans Court").[1] In fact, the Veterans Court relied on that doctrine as an alternative basis for its holding. *Smith v. Nicholson,* 19 Vet. App. 63, 78 (2005) ("to the extent that there is any reasonable interpretative doubt regarding the meaning of § 4.25(b) and its application to DC 6260 . . . such doubt is to be resolved in favor of the veteran."). Second, in presenting his case to the Federal Circuit, Petitioner argued that the decision of the Veterans Court was proper and should be affirmed, regardless of the standard of review applied.[2] Because the Veterans Court decided in Petitioner's favor, it was sufficient that Petitioner argued its decision should be affirmed by rebutting arguments made by the government.

There is no legal principle requiring "incantation of particular words," but only "that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174-175 (1988)). This requirement is met in this case. Parties are not required to anticipate all of the possible bases upon which a court of appeals may decide a case. Where a court of

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[1] *Smith v. Nicholson*, 19 Vet. App. 63, 69 (2005).

[2] Petitioner's Federal Circuit Brief, 2005 WL 3738090 (Brief of Claimant-Appellee at 1, 3, 5, 6, 9, *Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006) (No. 05-7168)).

appeals fully considers an issue, it is proper for the Court to consider that issue even if it was not raised before the court of appeals. *See Jones v. United States,* 362 U.S. 266, 272 (1960), *overruled on other grounds by U.S. v. Salvucci*, 448 U.S. 83 (1980); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

The cases cited by the government are not contrary. *Illinois v. Gates*, 459 U.S. 1028 (1982), Resp. 6, is a dissent, and hence, is not persuasive authority for the proposition for which it is cited. In addition, *Gates* is distinguishable as it is based on review of a "*factual* issue on which neither party adduced any evidence." *Id.* at 1029 (emphasis added). The government's reliance on *Tennessee v. Dunlap*, 426 U.S. 312, 316, n.3 (1976), is misplaced because in that case the Court refused to consider an issue that was not presented in the complaint, at the district court, or at the appellate court.

Neither case relied on by the government prohibits review of Petitioner's arguments. Even if not formally presented to the Federal Circuit, Petitioner's arguments still may be properly considered by this Court. For example, in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 778, 783, n.14 (1980), the Court considered an issue presented on *certiorari* by a party who, like Petitioner, had prevailed on that issue in the district court but who, because of her success at the district court, had not presented arguments on that issue to the appellate court. *See also Carlson v. Green,* 446 U.S. 14, 17, n.2 (1980). Thus, Petitioner's arguments are properly before this Court and should be considered.

II. The Federal Circuit Should Defer to the Veterans Court

According to the government, Congress "bypassed" the Veterans Court, instead making the actions of the Secretary of Veterans Affairs subject to review by the Federal Circuit.[3] Resp. 7. That argument is illogical given the congressionally mandated standards of review for both the Veterans Court and the Federal Circuit. As explained in the Brief of *Amicus Curiae* Veterans of Foreign Wars of the United States ("Brief of VFW *Amicus*"), the Federal Circuit is required to apply the same deferential standard when reviewing a direct challenge to a newly promulgated "regulation" or the Veterans Court's "interpretation thereof" when reviewing a Board decision. 38 U.S.C. § 7292. The statute prescribing review by the Veterans Court, however, does not specify the deferential standard of review for "interpretations of regulations." 38 U.S.C. § 7261. "Congress obviously could have used that or similar language to expressly require the Veterans Court to review the VA's regulatory interpretations under the deferential arbitrary and capricious standard, but it did not." VFW *Amicus* 9.

The Secretary can make the ratings schedule at will, but the Veterans Court has *exclusive* jurisdiction to review

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[3] In support of its argument the government relies on cases previously distinguished by Petitioner, Pet. 7, without providing any reasoning why the distinctions highlighted in the petition are not significant. Specifically, the government cites the discussion of *Auer v. Robbins*, 519 U.S. 452 (1997) in *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Petitioner previously explained that *Auer* is not controlling because it does not involve review of an agency interpretation by an Article I court. Pet. 7. The other cases cited by the government, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) suffer similar distinctions. Pet. 11-12.

interpretations of that schedule as applied in decisions of the Board of Veterans' Appeals. 38 U.S.C. §§ 7252, 7261; *Sellers v. Principi*, 372 F.3d 1318, 1324 (Fed. Cir. 2004). If the Veterans Court interprets the ratings schedule in a manner with which the Secretary disagrees, then the Secretary can change the schedule. *See* 38 U.S.C. §§ 1155, 7252(b). The Secretary has the authority to proscribe all necessary regulations, 38 U.S.C. § 501, and Congress has empowered the expert Veterans Court to overturn unlawful interpretations of those regulations.

This power of the Veterans Court is significant because it is an expert authority on VA regulatory interpretations, Pet. 9, a characterization not disputed by the government. The Veterans Court is an Article I court within the Executive Branch of government. Pet. 8-10. Unsure of its position,[4] the government neglects to dispute the law relied on by Petitioner, Pet. 9-10, and instead assumes "*arguendo*" that the Veterans Court falls within the Executive Branch.[5] Resp. 8. Based on that "assumption," the government relies on *Martin v. OSHRC,* 499 U.S. 144 (1991). Resp. 8-9. As stated in the Brief of VFW *Amicus*, however, "although *Martin* may suggest a presumption that an adjudicatory body, such as the Veterans

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[4] The government previously has adopted the position that an Article I court is within the Executive Branch of government. *Freytag v. C.I.R.*, 501 U.S. 868, 885 (1991) (asserting that "the Tax Court is a department" of the Executive Branch).

[5] The government also argues that, if the Article I Veterans Court is outside the Executive Branch, then it is undisputed that the agency interpretation, not that of a reviewing Article I court, is entitled to deference. Resp. 9. However, the government fails to cite any persuasive authority for this position. The government's cases easily are distinguished because, contrary to this case, they do not involve review by an Article I court created to ensure government awarded rights are protected.

Court, does not exercise interpretive lawmaking power, it nevertheless acknowledges that 'Congress is free, of course,' to delegate those powers 'as it chooses.'" VFW *Amicus* 7 (citing *Martin*, 499 U.S. at 158). Here, Congress did just that; it chose to delegate the power to make authoritative regulatory interpretations to the Veterans Court. *See* Pet. 10-13; VFW *Amicus* 7-10. Because the Veterans Court is so empowered, the Federal Circuit should have deferred to it.

III. Ambiguities in Provisions Granting Benefits to Veterans Must Be Construed in Favor of the Veteran

Not only does the government fail to provide any support for its position that the Fishgold Rule does not apply, the government fails to address Petitioner's citation to and reliance on *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21, n.9 (1991), in which this Court suggested that application of the Fishgold Rule is broader and applies to ambiguities in "*provisions*" granting benefits to veterans. Pet. 15. The non-adversarial nature of procedures involving veterans strongly evidences Congress' intent to resolve all issues by giving the veteran the benefit of any reasonable doubt. Pet. 13. The government fails to refute Petitioner's reliance on the expressed intent of Congress. Pet. 16. As recognized in the Brief of VFW *Amicus*, because the Federal Circuit itself concluded that the regulations at issue were ambiguous, it should have interpreted those regulations in favor of Petitioner, as the Veterans Court did consistent with this Court's precedent. VFW *Amicus* 9. The government's failure to cite any persuasive authority in support of its position, and its failure to address Petitioner's arguments and supporting law demonstrates the

weakness of the government's position and the need for this Court's guidance.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to review the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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